Supreme Court, U.S.
FILED

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

ANDREI NICULESCU,
Petitioner,

VS.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED

When an order of deportation is entered coupled with an order of voluntary departure, does the order of deportation becomes final on the date of the Board's decision or on the expiration date of the voluntary departure's order pursuant to 8 C.F.R. § 241.31

8 C.F.R. § 241.31, states as follows:

> "Except as otherwise provided by section 242(c) of the Act for the specific purposes of that section, an order of deportation, including an alternate order of deportation coupled with an order of voluntary departure, made by the immigration judge in proceedings under 8 C.F.R. part 2409 shall become final upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken; or, if such an order is issued by the Board or approved by the Board upon certification, it shall become final as of the date of the Board's decision."

In our instant matter, on October 14, 1997, the Board entered the following order against Petitioner:

> "The appeal is dismissed.
>
> FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order."

Section 309(c)(4)(C) of Illegal Immigration Reform and Immigrant Responsibility Act of 1966, as amended, states in pertinent part, as follows:

> "the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation."

On November 17, 1997 A Petition for Review was filed on behalf of Petitioner with the United States Court of Appeals For the Ninth Circuit.

On November 17, 1997, the U. S. Court of Appeals for the Ninth Circuit assigned docket number 97-71283 to the instant matter.

On December 1, 1997, The Immigration and Naturalization Service submitted to the United States Court of Appeals For the Ninth Circuit, a motion to dismiss Petitioner's Petition for Review for lack of jurisdiction.

On January 26, 1998, the United States Court of Appeals For the Ninth Circuit ordered Petitioner's Petition for Review dismissed for lack of jurisdiction. The United States Court of Appeals For the Ninth Circuit on its order, stated to see *Narayan vs. INS*, 105 F.3d 1335 (9th Cir. 1997).

PARTIES TO THE PROCEEDING

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OPINIONS BELOW

To the best of my knowledge, there are not official and/or unofficial opinions dealing the question presented.

JURISDICTION

The order printed in Appendix 1, attached hereto, which petitioner seeks to have reviewed is dated January 26, 1998, and was entered on January 26, 1998.

The jurisdiction of this Court is invoked under Title 28, Section 1257(a) of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

8 C.F.R. § 241.31, which states as follows:

> "Except as otherwise provided by section 242(c) of the Act for the specific purposes of that section, an order of deportation, including an alternate order of deportation coupled with an order of voluntary departure, made by the immigration judge in proceedings under 8 C.F.R. part 2409 shall become final upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken; or, if such an order is issued by the Board or approved by the Board upon certification, it shall become final as of the date of the Board's decision."

STATEMENT OF THE CASE

The Board of Immigration Appeals sustained an Immigration Judge order of denying appellant's petition for political asylum in a hearing in which appellant contends he was denied fundamental fairness to which he was entitled. The Board of Immigration Appeals decision of affirming the

Immigration Judge's order was coupled with an order of voluntary departure and was rendered on October 14, 1997.

Petition for Review was filed on behalf of appellant on November 17, 1997, with the United States Court of Appeals For the Ninth Circuit. On November 17, 1997, the U. S. Court of Appeals assigned docket number 97-71283 to this case.

REASONS FOR ALLOWANCE OF THE WRIT

In our instant matter, the Board of Immigration Appeals rendered its final decision on October 14, 1997. The Board order, which is printed in its entirety in Appendix 2, granted petitioner voluntary departure from the United States within 30 days of the Board's order; and in the event of failure so to depart, petitioner shall be deported as provided in the Immigration Judge's order.

Consistent with the board's order, petitioner submits that since he was being allowed to depart voluntarily up to and including November 14, 1997, the Board's order of deportation did not become final until the date in which failed to depart from the United States, that is November 14, 1997.

Therefore, pursuant Section 309(c)(4)(C) of Illegal Immigration Reform and Immigrant Responsibility Act of 1966, as amended, petitioner had until December 17, 1997 in which to submit a Petition for Judicial Review to an appropriate court.

On November 17, 1997, Petitioner submitted his Petition for Review to the United States Court of Appeals For the Ninth Circuit. Therefore, the United States Court of Appeals For the Ninth Circuit had and has jurisdiction to review petitioner's case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: June 26, 1998

Respectfully submitted,

Andrei Niculescu
Petitioner & Attorney
In Pro Per

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREI NICULESCU,
Petitioner,
vs.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

FILED
Jan. 26, 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS
No. 97-71283
INS #A73-961-860

ORDER

Before: BROWNING, KLEINFELD, and THOMAS, Circuit Judges

Respondent's motion to dismiss the petition for review for lack of jurisdiction is granted. *See Naravan v. INS,* 105 F.3d 1335 (9th Cir. 1997).

All pending motions are denied as moot.

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APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73 961 860 — Los Angeles Date: October 14, 1997

In re: ANDREI NICULESCU

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: James L. Rosenberg, Esquire
3250 Wilshire Boulevard, Suite 1702
Los Angeles, California 90012

ON BEHALF OF SERVICE: Chuck Redman
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)]
In United States in violation of law

APPLICATION: Asylum; withholding of deportation

In a decision dated June 20, 1996, an Immigration Judge found the respondent deportable as charged, denied his applications for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h), but granted his request for voluntary departure under section 244(e) of the Act, 8 U.S.C. § 1254(e). The respondent's appeal will be dismissed.

The respondent is 42-year-old native and citizen of Romania who entered the United States in August of 1995. The respondent contends that he left Romania because he was unable to invest in publicly-held corporations because of his political opinion and his Greek ethnic heritage. On appeal, the respondent avers that he was denied due proceed of law because the Immigration Judge refused to permit him to fully develop his claim.

While we note the Immigration Judge's increasing lack of patience with the respondent's presentation of his claim, we do not find that the respondent was denied due process of law. The record indicates that the respondent asked for, and received, an extension of time at his December 19, 1995, hearing so that he could seek legal counsel (Tr. at 2). Although the respondent informed the Immigration Judge at the initial hearing that a Romanian interpreter was not needed, he requested an interpreter at his January 8, 1996, hearing. The Immigration Judge reset the hearing so that an interpreter would be available, and also to allow the respondent additional time to procure counsel (Tr. at 6). When proceedings resumed on April 1, 1996, the respondent presented several documents that were either untranslated or were documents that he had translated. The Immigration Judge explained why the documents could not be accepted and reset the hearing so that the respondent could correct the error (Tr. at 26).

Proceedings again were reset for the benefit of the respondent on June 18, 1996, so that the respondent could obtain photocopies of documents and retain any originals that he might need. At a hearing on June 20, 1996, the respondent was again offered an opportunity to obtain counsel. He informed the Immigration Judge that he wished to proceed pro se (Tr. at 33). The respondent was again asked by the Immigration Judge to consider obtaining counsel (Tr. at 35).

While we appreciate the frustration felt by the respondent because he perceived that he was not able to fully develop his claim, we do not find that he was denied a reasonable opportunity to present his application. As noted above, the respondent was provided ample opportunity to obtain counsel to aid in presenting his case and was permitted to reset his hearing several times so that he could garner additional support for his claim. The record indicates that the Immigration Judge's desire to facilitate determining the respondent's basis for seeking asylum did not prevent the respondent from adequately presenting his claim. Accordingly, we find that the respondent was provided a reasonable opportunity to present his case and was not denied due process of law.

We find, as did the Immigration Judge, that the treatment the respondent received in Romania did not amount to past persecution within the meaning of the Act. Although the respondent indicated that executive and key management personnel were permitted to purchase much larger stakes in the new ventures than workers at his level, that does not constitute "persecution" on account of one of the five grounds enumerated in the Act. The respondent has not shown that the economic detriment he would experience would be severe or unique. *See, e.g., Tukhowinich v. INS*, 64 F.3d 460, 464 (9th Cir. 1995). In sum, we do not find that the treatment that the respondent received rises to the level of "persecution" as defined in the Act.

The respondent has similarly failed to demonstrate that he possesses a well-founded fear of persecution were he to return to Romania. The Department of State's Bureau of Democracy, Human Rights and Labor report on country conditions dated February 1995 is included in the record. The report reveals that Romania has been profoundly transformed since the overthrow of the communist dictator Ceausescu in 1989, and that changes in Romania have been

fundamental. While the report notes that the country continues to struggle with the political, economic, and social pressures produced by its transition from a totalitarian and centralized state to a democracy with a free market economy, civil liberties, including freedom of speech, press, assembly, association, religion, and travel are respected.

Although the respondent has presented evidence that suggests that Romania is still in the infancy of its transition, the country profile provides compelling evidence of the profound changes that have taken place in Romania. *See Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1994) (country condition profiles developed by the U.S. State Department are "the most appropriate and perhaps the best resource" for "information on political situations in foreign nations.") (quoting *Rojas v. INS*, 937 F.2d 186, 190 n.1 (5th Dir. 1991)). According to the Report, solid progress continues to be made in human rights, however, large numbers of Romanians leave to seek economic opportunity and a better life in Western Europe and North America.

Based on the above, we conclude that the evidence presented failed to establish that the respondent suffered past persecution or that he possesses a well-founded fear of persecution if he were to return to Romania. Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he has also failed to satisfy the clear probability standard of eligibility required for withholding of deportation. *See Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The evidence does not establish that it is more likely than not that the respondent would be subject to persecution on account of one of the five grounds specified in section 243(h) of the Act. *See INS v. Stevic*, 467 U.S. 407 (1984).

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

/s/ LORI D. LASINSKY
FOR THE BOARD